Usahasama SPNB-LTAT Sdn Bhd v Borneo Synergy (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5–24–311 OF 2008
RAMLY ALI J
6 JANUARY 2009

Arbitration — Arbitrator — Jurisdiction — Whether arbitrator had arbitral jurisdiction to hear and adjudicate dispute arising between parties

Arbitration — Award — Setting aside — Application for — Whether arbitration clause in main contract extended to dispute — Whether true intention of parties was to be bound by arbitration clause in main contract — Whether plaintiff estopped from asserting that there was no contract

On 29 July 2003, the plaintiff entered into a contract with Perbadanan Perwira Habib Malaysia ('PPHM') and appointed the latter as its main contractor to carry out certain works. PPHM, in turn appointed the defendant as its subcontractor. During the later stage of the works, PPHM purported to withdraw from its contract with the plaintiff ('the main contract') and recommended to the plaintiff that the remainder of the piling works under the main contract be transferred to the defendant to continue and complete. PPHM's suggestion was taken up and acted upon by the plaintiff, who in its letter dated 21 December 2004 to the defendant agreed to let the defendant complete the outstanding piling work according to the existing contract rates. The defendant accepted the plaintiff's offer and in its letter dated 29 December 2004 to the plaintiff confirmed that the remainder of the piling work would be completed under a separate agreement direct with the plaintiff. Thereafter, a document referred to as the deed of assignment, dated 8 December 2004, was entered into between PPHM and the defendant acknowledged by the plaintiff. The defendant then sought the plaintiff's confirmation that the deed of assignment would bring into effect a contractual nexus between the plaintiff and the defendant which included the defendant taking over PPHM's role under the main contract in relation to the piling works. The plaintiff concurred with the defendant's understanding on this issue. Later a dispute arose between the plaintiff and the defendant in respect of the payment for work done and damages suffered by the defendant. The defendant then issued an arbitration notice, pursuant to cl 54 of the main contract, upon the plaintiff. At the outset of the arbitral

proceedings, the plaintiff raised a challenge to the jurisdiction of the arbitrator to hear the dispute. After reading the written submission of the parties the arbitrator decided that he had the jurisdiction to hear the dispute and hence this application by the plaintiff to set aside the arbitrator's award. The plaintiff submitted that there was no arbitration agreement between the parties because there was no binding contract between the plaintiff and the defendant. It further submitted that the assignment was not an absolute assignment of the main contract and that there was no arbitration clause in the assignment. The defendant contended that the arbitrator had jurisdiction because the facts show that it was the intention of the parties to be bound by the terms of the main contract and that cl 54 of the main contract had an arbitration clause. The defendant also relied on estoppel to prove that there was a contract between the parties and that it was based on the terms of the main contract. The main issue to be decided in this case was whether upon a proper interpretation of the documents relied upon by the parties and their conduct, the arbitration clause in the main contract would extend to the dispute between the plaintiff and the defendant.

Held, dismissing the application with costs:

(1) In the present case it could be seen that there was a clear intention by all the parties that there shall be a binding contract between the plaintiff and the defendant on the terms of the main contract upon the withdrawal of PPHM from the main contract. The plaintiff's letter of offer dated 21 December 2004 agreeing to let the defendant complete the outstanding piling work and the defendant's acceptance of that offer showed a clear intention of the parties to form a new contract for the remaining piling work. The parties had conducted themselves as if the terms of the main contract applied to their relationship (see paras 7, 9, 15, 25–26).

(2) The true understanding of the parties as to the effect of the deed of assignment was that it brought into effect a direct contractual nexus between the plaintiff and the defendant that saw the defendant taking the place of PPHM under the main contract in respect of the remainder of the piling works. As this contractual nexus was confirmed in the plaintiff's letter to the defendant, the plaintiff was estopped from asserting that there was no contract and that there was only an assignment of payment (see paras 21–22).

(3) From January 2004, the plaintiff, the plaintiff's consultant and the defendant had redefined the way they each treated the other and had treated each other on the basis that the defendant was the plaintiff's contractor for the remainder of the piling work. By so doing they had

proceeded on the basis that the terms of main contract applied to them and they were therefore bound by such an interpretation based on their conducts (see paras 25, 29 & 33).

(4) In this case there was also a legal assignment of the monies due under the main contract by way of a deed of assignment. A legal assignment of this nature also operates to assign all remedies that would have been available to claim such money (see para 41).

(5) The arbitrator had properly interpreted the facts giving rise to the incorporation of the arbitration agreement (see para 39).

[Bahasa Malaysia summary

Pada 29 Julai 2003, plaintif memasuki satu kontrak dengan Perbadanan Perwira Habib Malaysia ('PPHM') dan melantik PPHM sebagai kontraktor utama untuk menjalankan kerja-kerja tertentu. PPHM, kemudiannya melantik defendan sebagai subkontraktor. Semasa peringkat berikutnya kerja-kerja tersebut, PPHM kononnya ingin menarik diri daripada kontraknya dengan plaintif ('kontrak utama') dan mencadangkan kepada plaintif bahawa kerja-kerja cerucuk selebihnya di bawah kontrak utama dipindahkan kepada defendan untuk meneruskan dan menyiapkannya. Cadangan PPHM diambil dan dilaksanakan oleh plaintif, yang di dalam suratnya yang bertarikh 21 Disember 2004 kepada defendan bersetuju untuk membiarkan defendan menyiapkan kerja cerucuk yang belum dibuat berdasarkan kadar kontrak sedia ada. Defendan menerima tawaran plaintif dan di dalam suratnya yang bertarikh 29 Disember 2004 kepada plaintif mengesahkan bahawa kerja cerucuk yang selebihnya akan disiapkan di bawah satu perjanjian berasingan dengan plaintif. Seterusnya, satu dokumen yang dirujuk sebagai surat ikatan penyerahakkan, bertarikh 8 Disember 2004, dimasuki di antara PPHM dan defendan yang diakui oleh plaintif. Defendan kemudiannya memohon pengesahan plaintif bahawa surat ikatan penyerahakkan akan membawa kesan hubungan di bawah kontrak di antara plaintif dan defendan yang termasuk defendan mengambil alih peranan PPHM di bawah kontrak utama berhubung dengan kerja cerucuk. Kemudiannya satu pertikaian berbangkit di antara plaintif dan defendan berkenaan pembayaran untuk kerja yang dilakukan dan kerugian yang dialami oleh defendan. Defendan kemudiannya mengeluarkan satu notis timbangtara, berikutan klausa 54 kontrak utama, ke atas plaintif. Pada permulaan prosiding timbangtara, plaintif membangkitkan satu cabaran kepada bidang kuasa penimbangtara untuk mendengar pertikaian tersebut. Setelah membaca hujahan bertulis pihak-pihak terlibat penimbangtara memutuskan bahawa beliau mempunyai bidang kuasa untuk mendengar pertikaian tersebut maka permohonan ini oleh plaintif untuk mengenepikan keputusan penimbangtara. Plaintif berhujah bahawa tidak terdapat perjanjian

timbangtara di antara pihak-pihak terlibat kerana tidak terdapat kontrak yang mengikat di antara plaintif dan defendan. Ia seterusnya berhujah bahawa penyerahhakkan tersebut bukanlah satu penyerahhakkan penuh kontrak utama dan tidak terdapat klausa timbangtara di dalam penyerahhakkan tersebut. Defendan berhujah bahawa penimbangtara mempunyai bidang kuasa kerana fakta-fakta menunjukkan bahawa adalah hasrat pihak-pihak untuk terikat oleh terma-terma kontrak utama dan bahawa klausa 54 kontrak utama mempunyai klausa timbangtara. Defendan juga bergantung ke atas estopel untuk membuktikan bahawa terdapat kontrak di antara pihak-pihak dan ia berdasarkan kepada terma-terma kontrak utama. Isu utama yang perlu diputuskan di dalam kes ini adalah sama ada dengan tafsiran yang betul dokumen-dokumen yang dirujuk oleh pihak-pihak dan tindakan mereka, klausa timbangtara di dalam kontrak utama akan merangkumi pertikaian di antara plaintif dan defendan.

Diputuskan, menolak permohonan dengan kos:

(1) Dalam kes ini dapat dilihat terdapat niat jelas kesemua pihak bahawa akan terdapat satu kontrak mengikat di antara plaintif dan defendan atas terma-terma kontrak utama selepas penarikan PPHM daripada kontrak utama. Surat tawaran plaintif bertarikh 21 Disember 2004 yang menyetujui untuk membiarkan defendan menyiapkan kerja cerucuk yang belum siap dan penerimaan defendan terhadap tawaran tersebut menunjukkan niat yang jelas pihak-pihak untuk membentuk kontrak baru bagi kerja cerucuk yang belum siap itu. Pihak-pihak telah masing-masing bertindak seolah-olah terma-terma kontak utama digunapakai kepada hubungan mereka (lihat perenggan 7, 9, 15, 25–26).

(2) Pemahaman sebenar pihak-pihak ke atas kesan surat ikatan penyerahakkan adalah ia membawa kesan hubungan di bawah kontrak di antara plaintif dan defendan dan ini menyebabkan defendan mengambil alih kedudukan PPHM di bawah kontrak utama berkaitan dengan kerja cerucuk yang selebihnya. Memandangkan hubungan di bawah kontrak ini disahkan di dalam surat plaintif kepada defendan, plaintif diestop daripada mengatakan bahawa tidak terdapat kontrak dan hanya terdapat penyerahhakkan pembayaran (lihat perenggan 21–22)

(3) Dari bulan Januari 2004, plaintif, perunding plaintif dan defendan telah menjelaskan semula cara mereka melayan satu sama lain dan telah melayan di antara mereka berdasarkan bahawa defendan adalah kontraktor plaintif untuk kerja cerucuk yang selebihnya itu. Dengan berbuat demikian mereka telah meneruskan atas dasar bahawa

terma-terma kontrak utama terpakai kepada mereka dan mereka oleh itu terikat dengan tafsiran sedemikian berdasarkan tindakan mereka (lihat perenggan 25, 29 & 33).

(4) Dalam kes ini terdapat juga penyerahhakkan undang-undang berkenaan wang berbayar di bawah kontrak utama melalui surat ikatan penyerahhakkan. Penyerahhakkan undang-undang seperti ini juga beroperasi untuk menyerahhakkan semua remedi yang terdapat untuk menuntut wang sedemikian (lihat perenggan 41).

(5) Penimbangtara telah mentafsirkan secara betul fakta-fakta yang membangkitkan penubuhan perjanjian timbangtara (lihat perenggan 39).]

Notes

For cases on jurisdiction, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1257–1265.

For cases on setting aside, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1366–1427.

Cases referred to

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] 1 QB 84; [1981] 2 All ER 577; [1981] 3 WLR 565, CA (refd)

Bauer (M) Sdn Bhd v Deawoo Corp [1999] 4 MLJ 545, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Montedipe SpA & Anor v JTP-RO Jugotanker (The 'Jordan Nicolov') [1990] 2 LR 11 (refd)

WJ Alan & Co Ltd v El Nasr Export and Import Co [1972] 2 QB 189, CA (refd)

Legislation referred to

Arbitration Act 2005 s 9
Civil Law Act 1956 s 4
Law of Property Act 1925 [UK] s 136

Hisham Yusof (WA Adnan & Associates) for the plaintiff.
K Mohan (JL Khoo with him) (Shook Lin & Bok) for the defendant.

Ramly Ali J:

[1] Enclosure 1 is the plaintiff's originating summons dated 16 July 2008 wherein the plaintiff prays for the following court orders:

(a) this court set aside an award dated 16 June 2008 which was made and published by Mr Wilfred Abraham, the arbitrator;

(b) a declaration that any dispute between the plaintiff and the defendant shall only be referred to and adjudicated by the Malaysia Civil Court;

(c) a declaration that the appointment of Mr Wilfred Abraham as the arbitrator, which is based on cl 54 of the main contract dated 29 July 2003 made between the plaintiff and one Perbadanan Perwira Harta Malaysia, is not valid or void;

(d) a declaration that Mr Wilfred Abraham, the arbitrator has no arbitral jurisdiction to hear and adjudicate the dispute between the plaintiff and the defendant;

(e) costs; and

(f) other relief.

FACTUAL BACKGROUND

[2] On 29 July 2003, the plaintiff and one Perbadanan Perwira Harta Malaysia ('PPHM') has entered into a contract which, inter alia, appoints PPHM as the main contractor for the works known as '*Cadangan Pembangunan Bagi Rumah Kediaman Kakitangan Kerajaan di Atas Lot PT 2082, Jalan 1/76, Off Jalan Kampung Pandan, Mukim Ampang, 50600 Kuala Lumpur*' wherein the plaintiff is the employer of the said works.

[3] The defendant had been, at the initial stage of this project, the subcontractor to the plaintiff's main contractor, Perbadanan Perwira Habib Malaysia. During the performance of the works, PPHM purported to withdraw from the main contract existing between the plaintiff and PPHM, and recommended that the defendant be appointed to carry out the remaining piling works. Discussions ensued among the parties as to the arrangements for the remaining piling works.

[4] In due course, a deed of assignment was signed between the defendant and PPHM and acknowledged by the plaintiff. By its letter dated 25 March 2005, the defendant sought the plaintiff's confirmation that the deed of assignment brings into effect a contractual nexus between the plaintiff and the defendant which includes the defendant taking over PPHM's role under the main contract in relation to the piling works. The relevant part of the letter is reproduced in part here for its full effect:

> We refer to the deed of assignment from PPHM to Borneo Synergy (M) Sdn Bhd (acknowledged by USL) and the many discussions we had on the deed of assignment, and the best way to achieve the completion of the Piling Works.
>
> Borneo Synergy (M) Sdn Bhd, pursuant to the deed of assignment, will complete the Bored and Micropile works for the above Project per the schedule of rates at attachment 1 and 2 to this letter of clarification between USL and PPHM. USL

will pay for the balance of the piling works and any associated works required to place the piling works in a condition ready for the Construction Contractor to take over and commence the building and other works, as ordered by USL's consultant, pursuant to the schedule of rates and the payment terms attached.

That is in effect PPHM have assigned the remaining Bored and Micro Piling works, which they were obliged to execute under the main contract, to Borneo Synergy (M) Sdn Bhd and Borneo Synergy (M) Sdn Bhd will act as if they were PPHM for the remaining Piling works under the main contract irrespective of the termination of the main contract between USL and PPHM.

[5] The plaintiff in its letter dated 7 April 2005 concurred with the defendant's understanding, as shown below:

Further to your letter dated 25th March 2005 ref: No. BS-USL/UT/626/2005, please be informed we hereby concur with the content of your letter which is consistent with the deed of assignment signed between your good office and Perbadanan Perwira Harta Malaysia (PPHM).

As far as the works commenced after the signing of the deed of assignment, the liability and responsibility shall be under your good office ...

[6] Thereafter a dispute arose between the plaintiff and the defendant in respect of the payment for work done and damages suffered by the defendant. The defendant issued an arbitration notice dated 21 September 2006 to the plaintiff. The arbitration notice was issued pursuant to cl 54 of the main contract. Thereafter the Kuala Lumpur Regional Centre For Arbitration ('KLRCA') has appointed Mr Wilfred Abraham as the sole arbitrator for the dispute. At the outset of the arbitral proceedings, the plaintiff raised a challenge to the jurisdiction of the arbitrator to hear the dispute. After reading written submission of the respective parties, the arbitrator has decided that he has jurisdiction to hear the dispute via his award dated 16 June 2008. Hence, this application before this court.

THE PLAINTIFF'S CONTENTIONS

[7] The plaintiff challenges the jurisdiction of the arbitrator to hear the dispute between the parties on the ground that there is no arbitration agreement between the plaintiff and the defendant. The plaintiff's challenge is based on the followings:

(a) there is no binding contract between the plaintiff and the defendant;

(b) the assignment is not an absolute assignment for the main contract; and

(c) there is no arbitration clause in the assignment.

THE DEFENDANT'S CONTENTIONS

[8] The defendant on the other hand contends that there is jurisdiction because:

(a) the facts clearly show that the intention of the parties to be bound by the terms of the main contract, which has an arbitration clause at cl 54 of the PWD conditions of contract, upon the purported termination and/or withdrawal of PPHM (the previous main contractor) from the main contract;

(b) in any case, the plaintiff is estopped from denying that there exists a contract between the plaintiff and the defendant which is based on the terms of the main contract;

(c) in any event, as a matter of law, by operation of s 4 of the Civil Law Act 1956, the deed of assignment has the effect of assigning the remedy of arbitration as well.

THE ARBITRATOR'S DECISION

[9] By his award, the arbitrator decided that:

(a) it is clear that the intention of the parties was to continue with the terms of the main contract as if it were between the plaintiff and the defendant; and

(b) the main contract contains an arbitration clause, and hence the arbitrator has jurisdiction to hear disputes arising between the parties.

MAIN ISSUE

[10] The main issue to be decided by the court is whether upon a proper interpretation of the documents relied upon by the parties and their conducts, the arbitration clause in the main contract extend to the dispute between the plaintiff and the defendant.

FINDINGS OF COURT

[11] An arbitration agreement is an agreement by the parties to submit all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It may be in the form of an arbitration agreement. It shall be in writing. An arbitration agreement is considered to be in writing where it is contained in a reference

in an agreement to a document containing an arbitration clause which shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement (see s 9 of the Arbitration Act 2005).

[12] Most agreements to refer existing disputes to arbitration are made expressly, and usually in writing rather than orally. But an agreement to arbitrate a dispute and to be bound by the arbitration's award may be inferred from the conduct of the parties without any express agreement. The arbitrator's jurisdiction and authority may be derived from an agreement to be inferred from the conduct of the parties (see *The Law and Practice of Commercial Arbitration in England* by Mustill and Boyd (2nd Ed) at pp 133–134, as followed by the Court of Appeal in *Bauer (M) Sdn Bhd v Deawoo Corp* [1999] 4 MLJ 545 at p 563).

[13] The Court of Appeal's decision in *Bauer (M)* case clearly recognises that an arbitration agreement can come into existence either by incorporation, by reference or by conduct. At p 557, the Court of Appeal further held that '... whether an incorporation by reference was intended by the parties in a particular case is a question that must be resolved according to the peculiar facts of the individual case'. At p 559, the court further held that '... a term may be incorporated not only by words but also by conduct'.

TRUE INTENTION OF THE PARTIES

[14] As in all other agreements, the true intention of the parties either in writing or by their conducts is the paramount consideration to determine the existences of the agreement between them.

[15] In the present case, it can be seen that there is clear intention by all parties that there shall be a separate binding contract between the plaintiff and the defendant on the terms of the main contract upon the withdrawal and/or termination of the PPHM from the main contract.

[16] On 9 December 2004, PPHM informed the defendant that it has accepted the plaintiff's offer for it (PPHM) to withdraw and be released from the project. PPHM also recommended to the plaintiff that the remaining piling works under the main contract be transferred to the defendant to continue and complete. PPHM's letter dated 9 December 2004 is produced in part here:

> We write to inform you that the main contractor, Usahasama SPNB-LTAT Sdn Bhd (USL) has offered to Perbadanan Perwira Harta Malaysia (PPHM) to withdraw and be released from the above Project and PPHM has agreed to accept the aforesaid offer.

> We also wish to inform you that PPHM has conveyed to USL in its letter dated 2nd December 2004 for USL to consider retaining the subcontractors appointed by PPHM or its nominee to continue with and complete the works at site.
>
> In view thereof, kindly forthwith suspend all works on site until any further instructions or notice from us ...

[17] PPHM's suggestion was taken up and acted upon by the plaintiff in its letter dated 20 December 2004, where it is stated at the second and third paragraphs that:

> This is to inform you that we have agreed to let you complete the outstanding 20 nos bored piles according to the specification and the existing contract rates.
>
> However, this agreement and any payments thereof shall only be based on the 20 nos of bore piles and does not constitute as continuation of your sub-contract works with Perbadanan Perwira Harta Malaysia (PPHM).

[18] The plaintiff's offer dated 20 December 2004 (received by the defendant on 28 December 2004) was accepted by the defendant in its letter dated 29 December 2004 which states as follows:

> Thank you for your letter USL/UT1/PKG2/Piling/35SJ.14/ID dated the 20th December 2004 and which was received by us on the 28th December 2004.
>
> We wish to confirm our understanding that the further 20 piles shall be completed by us under a separate agreement direct with Usahama SPNB-LTAT Sdn. Bhd. and that the terms and conditions will be as per our letter BS-SPNB-LTAT/UT/587/2004.

[19] Thus, the clear intention of the parties was that a new contract be thereby formed between the plaintiff and the defendant for the remaining bored piling works.

[20] Further, it may be noted that a document dated 8 December 2004, referred to as the 'deed of assignment', was entered into between PPHM and the defendant acknowledged by the plaintiff. The plaintiff and its consultant also expressly acknowledged the defendant as its contractor in place of PPHM and referred to the existence of an 'assigned contract' with the defendant as can be seen in the various letters stated and exhibited here:

(a) by its letter to Wawasan Utama Sdn Bhd dated 6 June 2005, the plaintiff submitted the defendant's quotation as the quotation from 'kontraktor kami'.

(b) the plaintiff's consultant in its instruction to the defendant on 4 February 2005, confirmed that it has been informed by the plaintiff

during its meeting with the plaintiff on 2 February 2005 that the installation of the micropiles has been 'assigned' to the defendant; and

(c) in its letter dated 29 November 2006, the plaintiff has forwarded to the defendant the statement of final accounts prepared by the plaintiff's consultant, whereby the defendant was referred to as the 'deed of assignment contractor' and 'the contractor'.

[21] Notwithstanding the selective or narrow interpretation given to the deed of assignment by the plaintiff, the evidence taken as a whole shows clearly that the plaintiff and the defendant conducted themselves as if the terms of the main contract applied to their relationship. Indeed, the true understanding of the parties as to the effect of the deed of assignment was that it brought into effect a direct contractual nexus between the plaintiff and the defendant that sees the defendant taking the place of PPHM under the main contract in respect of the remaining piling works.

[22] As the plaintiff has confirmed that the contractual nexus of the type stated in the defendant's letter dated 25 March 2005 exist, the plaintiff is estopped from asserting that there is no contract and that there is only an assignment of payment. This is particularly so when the defendant has stressed that it has commenced and is proceeding with the work on this understanding.

[23] In the case of *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, Lord Denning stated that:

> If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so.

[24] The doctrine of estoppel is a wide one and has been involved to impose contractual obligation between parties. See the observations of the Supreme Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 344 as follows:

> It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387) and to create binding obligation where none previously existed (see *Sprio v Lintern* [1973] 3 All ER 319; [1973] 1 WLR 1002.

A CONDUCTS OF THE PARTIES

[25] From or about January 2004, the plaintiff, the plaintiff's consultant and the defendant redefined the way each treated the other, and have treated each other on the basis that the defendant (instead of PPHM) is the plaintiff's contractor for the remaining piling works. The evidence is overwhelming that the plaintiff and defendant proceeded on the basis that the terms of the main contract applied as between them.

[26] The plaintiff and its consultant expected delivery of the contractual obligations under the main contract directly from the defendant (instead of from PPHM), such as the submission of method statement for the works to be executed, their demand for progress and mitigation actions, the submission of as-built drawings, the execution of the works in accordance with the preambles in the main contract, the main contract generally and the letter of award issued to PPHM under the main contract. In particular:

(a) the plaintiff instructed the defendant to execute the works in accordance with the specifications and the design guidelines in its (the plaintiff) letter dated 15 April 2005;

(b) the plaintiff required the defendant to submit the as-built drawings to its consultant for purposes of finalising the certificate of practical completion and the final account. See the plaintiff's letter dated 6 April 2006;

(c) these are obligations under the main contract, in particular at cll 39 and 48 of Part D of the main contract and p F/17–F/19 of Part F of the main contract.

[27] The plaintiff and its consultant took the position that the defendant is bound by the preambles in the main contract and the main contract generally including PPHM's letter of award. See the letter from the plaintiff's consultant dated 27 December 2006 and the plaintiff's letter dated 28 December 2006. This is despite the fact that the preambles was not part of the subcontract and was never provided to the defendant whether under the subcontract or the main contract.

[28] The plaintiff and the plaintiff's consultant performed aspects of the plaintiff's obligation under the main contract for the defendant, for example the issuance of payment for work completed, the reconciliation of disputes with the defendant, the issuance of the certificate of practical completion and the finalisation of variations and the final account:

(a) payments were made directly by the plaintiff to the defendant as can be seen from the plaintiff's various letters dated 11 November 2006, 29 November 2006 and 11 December 2006;

(b) the plaintiff and/its consultant finalised the final accounts and issued the certificate of practical completion for the remaining piling works, as can be seen from its various letter dated 6 April 2006, 11 November 2006 and 21 November 2006;

(c) in response to the defendant's letter dated 12 June 12006 seeking the SO's decision on disputed matters of the contract pursuant to cl 54 of the PWD form (in the main contract), the plaintiff and the plaintiff's consultant responded on the basis that the defendant was entitled to do so. In particular, the plaintiff's consultant letter dated 2 November 2006, which was forwarded to the defendant by the plaintiff's letter dated 29 November 2006 was a direct response to the defendant letter dated 12 June 2006.

[29] The defendant similarly expected the plaintiff to perform its (the plaintiff's) contractual obligation, such as payment for work completed, the resolution of contractual obligations and the finalisation of the certificate of completion and final accounts, all of which are obligations under the main contract in particular at cll 39 and 48 of Part D of the main contract and pp F/17–F/19 of part F of the main contract:

(a) progress claims sent to the plaintiff and/or its consultant from January 2004 and continued up to the end of the works (see progress claim 22 dated 16 September 2005);

(b) the defendant in like manner responded to the instructions of the plaintiff and/or its consultant, seeking its (the defendant) compliance of the contractual obligations of the main contract;

(c) the defendant was instructed to attend the co-ordination meetings for the project together with the plaintiff's consultant and its other contractors;

(d) meetings were conducted directly by the plaintiff with the defendant and its (the plaintiff's) consultants.

[30] Importantly both the plaintiff and the defendant applied the requirements of the main contract in settling dispute by first pursuing its rights under cl 54 of the PWD form before initiating a notice of arbitration.

[31] The plaintiff and its consultants similarly responded to the defendant's request for the SO's decision pursuant to cl 54 of the PWD form.

[32] PPHM was never involved in these discussions and the discussions never took place through PPHM. In one instance, where the plaintiff has inadvertently put PPHM as the contractor in the penultimate certificate and copied the certificate to PPHM, the defendant has objected and in the statement of final account, this matter was rectified by the plaintiff.

[33] From January 2004, the defendant's progress claims for work completed were submitted and/or copied to the plaintiff and/or its consultant(s), where before they were sent to PPHM.

[34] On 4 February 2005, the plaintiff's consultant Messrs J & A Associates instructed that as the contract for the installation of the micropiles has now been 'assigned' to the defendant, the defendant is to submit its detailed method statement for its review and approval. The defendant has accordingly complied and performed this contractual obligation.

[35] Site meetings were commenced by the plaintiff and its consultant(s) with the defendant with the meeting held on 24 February 2005 being called the first site meeting.

[36] It can be seen from the above that the plaintiff, the plaintiff's consultant and the defendant each had dealt with each other as if the defendant is the other party to the main contract in respect of the remaining piling works. This has led the defendant to conduct itself as if it was a party to the main contract (which it need do it the contract was with PPHM under the subcontract). In such an instance, they are bound by such interpretation based on their conducts.

[37] In *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84; [1981] 2 All ER 577; [1981] 3 WLR 565, Court of Appeal in England stated at p 120:

> Although subsequent conduct cannot be used for the purpose of interpreting a contract retrospectively, yet it is often convincing evidence of a course of dealing after it. There are many cases to show that a course of dealing may give rise to legal obligations. It may be used to complete a contract which would otherwise by incomplete; see *Brogden v. Metropolitan Railway Co* (1877) 2 App Cas 666, at p 682, per Lord Hatherley... it must also be available … to interpret them. If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it — on the faith of which each of them to the knowledge of the other — acts and conducts their mutual affairs — they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not

— or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

[38] In the Federal Court case of *Boustead Trading (1985) Sdn Bhd*, Gopal Sri Ram JCA in delivering the judgment of the court stated as follows (at p 345):

The width of the doctrine has been summed by Lord Denning in the *Amalgamated Investment case* [1982] 1 QB 84 at p 122; [1981] 2 All ER 577 at p 584; [1981] 3 WLR 565 at p 575) as follows:

> … When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[39] The arbitrator in the present case had properly interpreted the facts giving rise to the incorporation of the arbitration agreement. See in particular the following excerpts of the arbitrator's award dated 16 June 2008:

I am however, of the view that this preliminary issue is not confined to me construing the deed of assignment only but it is to decide if there was privity of contract and if the contract entered into by PPHM and the respondent applied to the claimant and the respondent now. The pleadings are clearly premised on that basis and, as such, I will examine all the documents pertaining to this issue.

I have already decided that the deed of assignment does not convey any indication that the terms of the previous contract are to be applied. However, with the letters dated 25 March 2005 and 7 April 2005, I am of the view that it was the intention of the parties to apply the terms of the previous contract.

My understanding of these two letters is that this contract was being performed by the claimant were as if they PPHM and the works which were under the main contract.

This understanding is further fortified by further conduct of the parties after July 2005. This understanding is derived from the various correspondences passing between the parties as well as correspondences between the consultants of the claimant and the respondent.

When these documents are read together with the deed of assignment, it become abundantly clear that the parties acted as if they were dealing with the original contract as the basis of completing the works and its payment for such works.

The question that has to be answered is can all these documents and the subsequent conduct of the parties cause the contract to be effective. I hold that it can because it was always the parties' intention to do so ...

A ...

I find that there has been incorporation of the arbitration clause as well as a clear intention that the arbitration clause applies, this is found in the letters dated 29 January 2006 and 11 December 2006. Further, the responses by the respondent's consultants in respect of the claim lends further suggestion that all
B concerned were acting as if there was a contract in existence, which had an arbitration clause.

...

I am of the view that the parties were of a clear mind that the contract was afoot
C and the conditions thereto applied and in such circumstances, no party should be allowed to resile from it.

I therefore, hold that whilst the deed of assignment does not resolve if there was an assignment of the contract, but when read together with the letters between the parties, it becomes clear the intention was to continue with the terms of the
D contract as if it were between PPHM and the respondent. The contract contains an arbitration clause, which is binding on the parties and hence, it follows that I have jurisdiction to hear disputes arising between the parties.

E **[40]** Accordingly, the arbitrator's findings on this point ought not to be disturbed by the court.

ASSIGNMENT OF THE ARBITRATION CLAUSE

F **[41]** Further, in this case, there is a legal assignment of the monies due under the main contract by way of the deed of assignment dated 8 December 2004. A legal assignment of this nature also operates to assign all remedies that would have been available to claim such money. This is made clear by the decision in *Montedipe SpA & Anor v JTP-RO Jugotanker (The 'Jordan Nicolov')*
G [1990] 2 LR 11 in particular where the judge held:

... where the assignment of the cause of action, it will, in the absence of some agreement to the contrary, include as stated in s 136 all the remedies in respect of that cause of action. The relevant remedy is the right to arbitrate and obtain an arbitration award in respect of the cause of action. The assignee is bound by the
H arbitration clause in the sense that he cannot assert the assigned right without also accepting the obligation to arbitrate.

I **[42]** Section 4 of our Civil Law Act 1956 (like the UK s 136 of the Law of Property Act 1925) also provides for the remedy to be assigned, as stated below:

(3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other

person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

CONCLUSION

[43] Owing to the fact that there exists between the defendant and the plaintiff a binding contract on the terms of the main contract, it follows that cl 54 of the PWD form which is a part of the main contract is a term of the contract between the plaintiff and the defendant, and accordingly the arbitrator has jurisdiction to decide on the arbitration proceeding.

[44] On the facts at this case, in particular by the affirmation of cl 54 of the main contract, it is too late in the day for the plaintiff to complain that there is no arbitration agreement or that the arbitrator has no jurisdiction.

[45] The defendant has complied with the procedures laid down under the dispute resolution clause by serving a notice pursuant to cl 54 of the PWD form, and accordingly it is entitled to proceed with the arbitration on the disputed matters.

[46] For the above reasons, the court rules that the plaintiff's application under the originating summons be dismissed with costs.

Application dismissed with costs.

Reported by K Nesan